IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 151 OF 2005

IN

NOTICE OF MOTION NO. OF 2005

IN

LONG CAUSE SUIT NO. 343 OF 2005

Musakhan Madankhan .. Appellant
(Orig. Plaintiff)

V/s

The Municipal Corporation of Greater
Mumbai. .. Respondent
(Orig.Defendant)

Shri P.M.Pradhan with Shri A.S. Karwande for the Appellant

Shri N.V. Walawalkar with Ms. Jogalekar for the Respondent

Coram: A.S.Oka, J.

Date : 8th February,2005

JUDGMENT

1. Admit. The Respondent waives service. The challenge in this appeal from order is to the order dated 24th January 2005. By the impugned order, the prayer made by the Appellant herein for the grant of ad-interim relief has been rejected.

2. The challenge in the suit is the notice under section 351 of Bombay Municipal Corporation Act issued on 16th October,2004 and the order dated 11th January 2005 passed by the Deputy Municipal Commissioner.

3. After hearing the learned counsel appearing for the parties, I find that the prayer for ad-interim relief is not considered on merits by the learned Trial Judge only on the ground that photographs of the suit structure are not produced by the Appellant. The learned Trial Judge noted the contentions raised by the Advocate for the Appellant that the suit structure is not in the house galli but is on the ground floor of a building known as “Swastik Chambers”.A submission was also made which is noted in the order that above the suit structure are five floors of Swastik Chambers. While rejecting the prayer for ad-interim relief, no finding has been recorded by the learned trial judge on the submission made by the learned counsel appearing for Appellant/Plaintiff on merits.

4. In my view, when the submissions were made by the learned Advocate for the Appellant before the learned Trial Judge on merits, the case of the Appellant for the grant of ad-interim relief ought to have been examined on merits. Without examining the case on merits, the prayer for ad-interim relief could not have been rejected only on the ground of non-production of photographs of the structure.At the highest the learned Trial Judge could have granted reasonable time to the Appellant to produce photographs of the suit structure.

5. As the prayer for the grant of ad-interim relief is not considered on merits by the learned Trial Judge, I have no option but to set aside the impugned order and to remand the matter to the learned Trial Judge for fresh

consideration.

6. Shri Pradhan, learned counsel for the Appellant states that compilation of photographs is made ready and it will be filed in the trial court. Hence, I pass following order.

ORDER

1. The impugned order dated 24th January 2005 is quashed and set aside.
2. The learned trial judge will hear and decide afresh the prayer made by the Appellant in the notice of motion for grant of ad-interim relief.
3. Parties will appear before the learned trial judge on Tuesday 14th February 2005 at 11.00 a.m.
4. The learned trial judge will consider the prayer made in the notice of motion for the grant of ad-interim relief on its own merit and will pass appropriate order.
5. For a period of 3 weeks from today both the parties will maintain status-quo as of today to enable the learned trial judge to consider the prayer made in the notice of motion.
6. All contentions of both the parties on merits are kept open.
7. Parties concerned to act on an authenticated copy of this order.

(A.S. Oka, J.)